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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/773,894	02/06/2004	David J. Edmondson	1643.104 (PA000050)	8329
66313	7590	05/01/2009		
DOCKET CLERK P.O. BOX 12608 DALLAS, TX 75225				
EXAMINER NELSON, FREDA ANN				
ART UNIT		PAPER NUMBER		
3628				
NOTIFICATION DATE		DELIVERY MODE		
05/01/2009		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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### Office Action Summary

**Application No.**

10/773,894

**Applicant(s)**

EDMONDSON ET AL.

**Examiner**

FREDA A. NELSON

**Art Unit**

3628

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 18 February 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1.5-15 and 18-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1.5-15 and 18 is/are rejected.
- 7) ☒ Claim(s) 7 and 18 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/S508)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

### **DETAILED ACTION**

The amendment received on February 18, 2009 is acknowledged and entered. Claims 1, 7, 15, and 23 have been amended. Claims 2-4 and 16-17 have been canceled. No claims have been added. Claims 1, 5-15 and 18-24 are currently pending.

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 18, 2009 has been entered.

### ***Response to Amendments and Arguments***

Applicant's arguments filed February 18, 2009 have been fully considered but they are not persuasive.

1. In response to applicant's arguments that in regards to claims 1 and 15, "Eglen et al. fails to disclose such structure or methodology, as now recited" and "no mention is made in these recited sections basing demand upon indications of inquires of availability of content, the Examiner asserts that Eglen et al. discloses, in another form, the dynamic price modifier can take into account profitability of different price levels. It should be understood that the dynamic pricing modifier can take into account other

factors. These factors can include, but are not limited to: the marginal and/or fixed costs of the item; price ceilings and/or floors for the item; file size of the item; the bandwidth of the connection to the dynamic pricing system 102; the quality of the item; the popularity of the item as measured by third parties, such as the Billboard ranking of a song; *reviews of an item; and number of times an item has been viewed on the dynamic pricing system 102 (paragraph [0122])*. Eglen et al. further disclose with a zero (\$0.00) account balance 1004, the user can still use the dynamic pricing system 102. For example, an artist does not need money in order to supply content to the dynamic pricing system 102. *In another example, even with a zero account balance, a customer can download free content from the dynamic pricing system 102 (paragraph [0073])*. The Examiner interprets the above passages to mean that the consumer has to inquire about the availability of an item in order to view the item even if the item is free.

Furthermore, the specification uses the terms "inquiries of availability" two times, however, there is no clear definition of what is meant by inquiries of availability. Therefore, unless a term is given a "clear definition" in the specification (MPEP § 2111.01), the examiner is obligated to give claims their broadest reasonable interpretation, in light of the specification, and consistent with the interpretation that those skilled in the art would reach (MPEP § 2111).

An inventor may define specific terms used to describe invention, but must do so "with reasonable clarity, deliberateness, and precision" (MPEP § 2111.01.111). A "clear definition" must establish the metes and bounds of the terms. A clear definition must

unambiguously establish what is and what is not included. A clear definition is indicated by a section labeled definitions, or by the use of phrases such as "by inquiries of availability we mean"; "inquiries of availability is defined as"; or "inquiries of availability includes, ... but does not include ...". In the instant case, the examiner is required to give the term its broadest reasonable interpretation (MPEP § 2111 ), which the examiner judges to be "using the search button or requesting to view a free item". Therefore, the Examiner interprets the above passages to mean that the consumer has to inquire about the availability of an item in order to view the item even if the item is free.

***Claim Rejections - 35 USC § 112, 1<sup>st</sup> Paragraph***

2. The claim rejections under 35 USC 112, 1<sup>st</sup> and 2<sup>nd</sup> Paragraphs have been withdrawn due to Applicant's amendment.

***Claim Objections***

3. Claims 7 and 18 are objected to because of the following informalities:  
Claim 7, line 1, "and the" should be "and"; and  
Claim 18, line 2, "and the at least the" should be "and the at least".  
Appropriate correction is required.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1, 5-14, and 21-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Eglen et al. (US PG Pub. 2003/0023505).

**As per claim 1**, Eglen et al. disclose an apparatus for associating a price indicia with each of the first content tile and at least a second content file stored at a content database of a content distribution facility, each of the first and at least second content files authored by content creators, said apparatus comprising:

a content creator database forming an author index that indexes a listing of content creators together with historical indicia associated with respective content creators, said historical indicia including indicia of historical sales of other content files authored by the respective content creators indexed together therewith (paragraphs [0060],[0063],[0065])

an initial price indicia associator adapted to receive content indicia associated with each of the first and at least second content files stored at the content database and adapted to access said content creator database, said initial price indicia associator for initially pricing each of the first and at least second content files with initial price indicia, the initial price indicia being based on said historical sales of other content files authored by the respective content creators of each of said first and at least second content files (paragraphs, [0059]-[0060],[0063]-[0064],[0081],[0122]-[0123],[0136]; see

FIG. 3) {the music databases 230 can store the file name of a song, the location of the file on the home music server 220, song title, artist, author, producer, distributor (label), album name, album picture, picture of the artist, musical category (i.e. rock, jazz . . .), description, comments, *pricing information*, *demand information*, and/or length/size of the song along with other information relating to the song};

a price indicia adjuster adapted to receive indications of the initial price indicia that said initial price indicia associator associates with each of the first and at least second content files and to receive indications of demand for each of the first and at least second content files, said price indicia adjuster for adjusting the initial price indicia responsive to the demand therefore, and for forming adjusted price indicia associated with each of the first and at least second content files (abstract; paragraphs [0058],[0073],[0099], [0122]).

While Eglen et al. discloses in another form, the dynamic price modifier can take into account profitability of different price levels. It should be understood that the dynamic pricing modifier can take into account other factors. These factors can include, but are not limited to: the marginal and/or fixed costs of the item; price ceilings and/or floors for the item; file size of the item; the bandwidth of the connection to the dynamic pricing system 102; the quality of the item; the popularity of the item as measured by third parties, such as the Billboard ranking of a song; *reviews of an item*; and *number of times an item has been viewed on the dynamic pricing system 102 (paragraph [0122])*. Eglen et al. further disclose with a zero (\$0.00) account balance 1004, the user can still use the dynamic pricing system 102. For example, an artist does not need money in

order to supply content to the dynamic pricing system 102. *In another example, even with a zero account balance, a customer can download free content from the dynamic pricing system 102 (paragraph [0073]).*

Eglen et al. does not explicitly disclose that the demand is based, at least in part, upon indication of availability. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a search for a free item as basis for adjusting a price based on demand (other than based on purchasing the item) since it's obvious to use search buttons. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Eglen et al. to include the feature of searching for and viewing free content to adjust pricing based on demand since the claimed invention is merely a combination of old elements, and in the combination each element merely would have performed the same function as it did separately, and one of ordinary skill in the art would have recognized that the results of the combination were predictable.

Furthermore, the specification uses the terms "inquiries of availability" two times, however, there is no clear definition of what is meant by inquiries of availability. Therefore, unless a term is given a "clear definition" in the specification (MPEP § 2111.01), the examiner is obligated to give claims their broadest reasonable interpretation, in light of the specification, and consistent with the interpretation that those skilled in the art would reach (MPEP § 2111). An inventor may define specific terms used to describe invention, but must do so "with reasonable clarity, deliberateness, and precision" (MPEP § 2111.01.111). A "clear definition" must



establish the metes and bounds of the terms. A clear definition must unambiguously establish what is and what is not included. A clear definition is indicated by a section labeled definitions, or by the use of phrases such as "by inquiries of availability we mean"; "inquiries of availability is defined as"; or "inquiries of availability includes, ... but does not include ...". In the instant case, the examiner is required to give the term its broadest reasonable interpretation (MPEP § 2111 ), which the examiner judges to be "using the search button or a request to view a free item".

**As per claim 5**, Eglen et al. discloses the a apparatus of claim 1 wherein the initial price indicia with which said initial price indicia associator associates with the first and at least second content files is directly related, at least in a stepwise manner, with the historical demand (paragraphs [0064],[0123]) {pricing algorithm parameters field 352 can store information such as the historical pricing and quantity ordered information for the item; and alternatively or additionally, the dynamic pricing system 102 in this and other embodiments can automatically set the initial price based on default prices and/or historical prices for similar content stored in memory 112}.

**As per claim 6**, Eglen et al. disclose the apparatus of claim 1 wherein the historical indicia indexed together with the content creator at the author index formed at said content creator database categorizes the historical demand into a first historical demand level at least a second historical demand level (paragraphs [0064],[0123]) {pricing algorithm parameters field 352 can store information such as the historical

pricing and quantity ordered information for the item; and alternatively or additionally, the dynamic pricing system 102 in this and other embodiments can automatically set the initial price based on default prices and/or historical prices for similar content stored in memory 112}.

**As per claim 7**, Eglen et al. discloses the apparatus of claim 1 wherein the first content file and the at least the second content file stored at the content database is at least selectably available for delivery to content consumers and wherein the indications of the demand to which said price indicia adjuster is adapted to receive further comprise indications related to inquiries relating to individual ones of the first and at least second content files (paragraphs [0052],[0058]).

**As per claim 8**, Eglen et al. disclose the apparatus of claim 7 wherein copies of the first and at least second content files are at least selectably available for purchase by the content consumers and wherein the inquiries selecting to the individual ones of the first and at least second content files comprise inquiries relating to purchase of copies of the individual ones of the first and at least second content files (paragraphs [0052],[0058]).

**As per claim 9**, Eglen et al. disclose the apparatus of claim 8 wherein the inquiries relating to the purchase of the copies of the individual ones of the first and at least second content files comprise indications of purchase requests made by the

content consumers (paragraph [0122])(the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}.

**As per claim 10**, Eglén et al. disclose the apparatus of claim 8 wherein the inquiries relating to the purchase of the copies of the individual ones of the first and at least second content files comprise indications of purchase completions made by the content consumers (paragraph [0122])(the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}.

**As per claim 11**, Eglen et al. disclose the apparatus of claim 1 wherein said price indicia adjuster is adapted to interactively adjust the adjusted price indicia associated with each of the first and at least second content files (paragraph [0122]) the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}.

**As per claim 12**, Eglen et al. disclose the apparatus of claim 1 wherein the indications of demand to which said price indicia adjuster is adapted to receive are applied to said price indicia adjuster at least at successive intervals, dynamically to receive the indications of the demand, and wherein said price indicia adjuster is adapted to further successively form the adjusted price indicia responsive to the indications of the demand received at the at least the successive intervals (paragraph [0122]) the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the

quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}.

**As per claim 13**, Eglen et al. disclose the apparatus of claim 12 wherein the adjusted price indicia formed by said price indicia adjuster formed at least at the successive intervals is adapted to incrementally change prior-formed values of the adjusted price indicia (paragraph [0122]){the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}..

**As per claim 14**, Eglen et al. disclose the apparatus of claim 1 further comprising a revenue allocator adapted to receive the indications of demand, said revenue allocator for allocating revenues associated with the first and at least second

content files (paragraph 0158; FIG. 30E and FIG. 31) {the owner of the dynamic pricing system 102 generates revenue by receiving a portion of the revenue generated by the sale of items on the dynamic pricing system 102}.

**As per claim 15**, Eglen et al. disclose a method for distributing content stored at a content database, the content formed of a first content file and at least a second content file, the first and at least second content files authored by content creators, said method for associating a price indicia with each of the first and at least second content files stored at the content database, said method comprising:

associating historical indicia with the content creators, the historical indicia including indicia of historical sales of content files authored by respective content creators indexed together therewith (paragraphs [0060],[0063]-[0065]);

initially pricing each of the first and at least second content files with initial price indicia responsive to the historical sales of other content files authored by the respective content creators of each of the first and at least second content files (paragraphs, [0059]-[0060],[0063]-[0064],[0081],[0122]-[0123],[0136]; see FIG. 3); and

adjusting the initial price indicia with which the first and at least second content files are initially priced during said operation of initially pricing responsive to indications of demand for each of the first and at least second content files to form adjusted price indicia associated with each of the first and at least second content files (abstract; paragraphs[0058], [0099]).

Eglen et al. does not explicitly disclose that the demand is based, at least in part,

upon indication of availability. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to include a search for a free item as basis for adjusting a price based on demand (other than based on purchasing the item) since it is obvious to use search buttons as a means of inquiring about an item.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Eglén et al. to include the feature of searching for and viewing free content to adjust pricing based on demand since the claimed invention is merely a combination of old elements, and in the combination each element merely would have performed the same function as it did separately, and one of ordinary skill in the art would have recognized that the results of the combination were predictable.

Furthermore, the specification uses the terms "inquiries of availability" two times, however, there is no clear definition of what is meant by inquiries of availability. Therefore, unless a term is given a "clear definition" in the specification (MPEP § 2111.01), the examiner is obligated to give claims their broadest reasonable interpretation, in light of the specification, and consistent with the interpretation that those skilled in the art would reach (MPEP § 2111). An inventor may define specific terms used to describe invention, but must do so "with reasonable clarity, deliberateness, and precision" (MPEP § 2111.01.111). A "clear definition" must establish the metes and bounds of the terms. A clear definition must unambiguously establish what is and what is not included. A clear definition is indicated by a section labeled definitions, or by the use of phrases such as "by inquiries of availability we

mean"; "inquiries of availability is defined as"; or "inquiries of availability includes, ... but does not include ...". In the instant case, the examiner is required to give the term its broadest reasonable interpretation (MPEP § 2111 ), which the examiner judges to be "using the search button or a request to view a free item".

**As per claim 18**, Eglen et al. disclose the method of claim 15 wherein copies of the first content file and the at least the second content file each are at least selectably available for delivery to content consumers and wherein the indications of the demand for each of the first and at least second content files comprise indications of requests made by the content consumers comprise indications related to at least requests for copies of selected ones of the first and at least second content files (paragraphs [0052],[0058]).

**As per claim 19**, Eglen et al. disclose the method of claim 15 wherein said operation of adjusting the initial price indicia further comprises adjusting the adjusted price indicia (paragraph [0060]) {the music databases 230 can store the file name of a song, the location of the file on the home music server 220, song title, artist, author, producer, distributor (label), album name, album picture, picture of the artist, musical category (i.e. rock, jazz . . . ), description, comments, pricing information, demand information, and/or length/size of the song along with other information relating to the song}.



**As per claim 20**, Eglen et al. disclose the method of claim 15 wherein adjustments to the adjusted price indicia during said operation of adjusting are performed incrementally (paragraph [0122]){the dynamic price modifier increases the price of an item when demand for that item increases and reduces the price of an item when the demand for the item decreases and in one form, the dynamic pricing modifier is based on the differences between the quantity ordered at specific intervals wherein, for instance, these intervals can be by second, by minute, hourly, daily, monthly, or yearly; and in another form, the dynamic pricing modifier is based on the time between successive purchases; for example, if the time delay between successive purchases decreases, the dynamic pricing system 102 can infer that demand is increasing and thus increase the price for the item}..

**As per claim 21**, Eglen et al. discloses wherein the initial price indicia formed is adjusted based on the delivery mechanism by which content is delivered to a respective content consumer ([0050],[0162]).

**As per claim 22**, Eglen et al. disclose the apparatus of claim 1 wherein the initial price indicia formed is adjusted based on whether a respective content consumer is a commercial content consumer or a non-commercial content consumer (paragraphs [0099],[0133],[0155]).

**As per claim 23**, Eglen et al. disclose the method of claim 15 wherein the operation of initially pricing further comprises initially pricing each of the first and at least second content files responsive also to the delivery mechanism by which content is delivered to a respective content consumer ([0050],[0162]).

**As per claim 24**, Eglen et al. disclose the method of claim 15 wherein the operation of initially pricing further comprises initially pricing each of the first and at least second content files responsive to whether a respective content consumer is a commercial content consumer or a non-commercial content consumer (paragraphs [0099],[0133],[0155]).

***Examiner's Note***

Examiner cited particular pages, columns, paragraphs and/or line numbers in the references as applied to the claims above for the convenience of the applicant. Although the specified citations are representative of the teachings in the art and are applied to the specific limitations within the individual claim, other passages and figures may apply as well. It is respectfully requested that, in preparing responses, the applicant fully consider the references in entirety as potentially teaching all or part of the claimed invention, as well as the context of the passage as taught by the prior art or disclosed by the examiner.

**Conclusion**

5. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

1) Zee (US PG Pub. 2003/0065642), which discloses an assured archival and retrieval system for digital intellectual property .

2) Vaidyanathan et al. (US Patent Number 7,469,230), which discloses a method and system for automatically distributing fees, including a reseller commission, during a digital file transaction.

3) Mesaros (US Patent Number 7,181,419), which discloses a demand aggregation system.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Freda A. Nelson whose telephone number is (571) 272-7076. The examiner can normally be reached on Monday - Friday, 10:00 am -6:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Hayes can be reached on 571-272-6708. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

For more information about the PAIR system, see <http://pair-direct.uspto.gov>.

Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/F. A. N./  
Examiner, Art Unit 3628

/FRED A. NELSON/  
Examiner, Art Unit 3628